

1 KAREN P. HEWITT
 2 United States Attorney
 2 CARLOS ARGUELLO
 3 Assistant U.S. Attorney
 3 California State Bar No. 157162
 4 United States Federal Building
 4 880 Front Street, Room 6293
 5 San Diego, California 92101
 5 Telephone: (619) 557-6252
 6 Facsimile: (619) 235-2757
 6
 7 Attorneys for Plaintiff
 7 United States of America

8 **UNITED STATES DISTRICT COURT**

9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,) Criminal Case No. 08cr0303BEN
 11 Plaintiff,) DATE: September 12, 2008
 12 v.) TIME: 2:00 p.m.
 13 JUAN ALONSO ROJO-CASTANEDA,) Honorable Roger T. Benitez
 14 Defendant.) Courtroom 3 (4th Floor)
 15) UNITED STATES' MOTIONS
 16) IN LIMINE TO:
 17) 1) ADMIT EXPERT TESTIMONY;
 18) 2) ADMIT DEMEANOR EVIDENCE;
 19) 3) LIMIT CHARACTER EVIDENCE; AND
 19) 4) COMPEL DISCOVERY.
 20)
 20) TOGETHER WITH STATEMENT OF
 21) FACTS AND MEMORANDUM OF
 22) POINTS AND AUTHORITIES
 23)
 24)
 25)
 26)
 27)
 28)

20 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through
 21 its counsel, Karen P. Hewitt, United States Attorney, and Carlos
 22 Arguello, Assistant United States Attorneys, and hereby files its
 23 motions in limine in the above-captioned case. These motions are
 24 based upon the files and records of this case, together with the
 25 attached statement of facts and memorandum of points and authorities.
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I.

STATEMENT OF FACTS

A. PRIMARY INSPECTION AT THE WESTMORLAND CHECKPOINT

4 On Wednesday, January 9, 2008, at approximately 3:20 a.m.,
5 Defendant Juan Alonso Rojo-Castaneda ("Defendant") drove a grey
6 Kenworth tractor trailer bearing California license plates to the
7 fully operational, United States Border Patrol checkpoint on Highway
8 86 in Westmorland, California. Defendant was hauling an approximately
9 53-foot semi-trailer. Defendant was the registered owner and sole
10 occupant of the tractor trailer.

11 United States Border Patrol Agent Freddy Carretero was working
12 at the primary inspection area at the checkpoint when Defendant's
13 tractor trailer approached. The agent asked Defendant routine
14 inspection questions. Defendant, age 32, stated he was a lawful
15 permanent resident of the United States and presented his permanent
16 resident alien card.

17 The agent then asked Defendant what type of cargo he was
18 transporting. Defendant responded that the trailer was empty and that
19 he was driving to Bakersfield. During this brief questioning, Agent
20 Carretero observed that Defendant appeared extremely nervous. The
21 agent noticed that Defendant seemed fidgety, avoided eye contact,
22 appeared eager to answer questions, and asked to be allowed to
23 continue on his way.

24 While Agent Carretero spoke with Defendant at the primary area,
25 Border Patrol Agent Vega, a canine handler, was working in the pre-
26 primary inspection area at the checkpoint with his assigned canine.
27 Agent Vega noticed the tractor trailer and had his canine conduct a
28 sniff of both the tractor trailer and semi-trailer. His assigned

1 canine Hoby alerted to the rear doors of the semi-trailer. At this
2 point, Agent Vega signaled to Agent Carretero to refer Defendant and
3 his truck to the secondary inspection area. As a result, Defendant
4 was referred to the secondary location.

5 **B. SECONDARY INSPECTION AT THE CHECKPOINT**

6 In the secondary inspection area, Agent Vega approached
7 Defendant and asked him what he had in the semi-trailer. Defendant
8 replied that it was empty. Agent Vega then asked Defendant if he
9 would consent to a search of the semi-trailer. Defendant consented
10 to a search and opened the rear doors of the semi-trailer. Agent Vega
11 looked inside the semi-trailer and saw several plastic crates double-
12 stacked together. Within moments, the canine alerted to the crates.

13 Border Patrol agents eventually removed eighteen (18) bales of
14 packages from within two crates located at the front end of the semi-
15 trailer. The contents of one of the bales field-tested positive for
16 marijuana. The gross weight of all the packages was 168 kilograms or
17 369 pounds. Agents subsequently placed Defendant under arrest for the
18 illegal possession of narcotics.

19 **C. DEFENDANT'S POST-ARREST STATEMENTS**

20 United States Drug Enforcement Administration Special Agent
21 Richard Slattery and Task Force Officer Pompeyo Tabarez assumed the
22 investigation of this case. Officer Tabarez advised Defendant of his
23 Miranda rights in the Spanish language with Special Agent Slattery
24 serving as a witness. Defendant stated he understood his rights and
25 agreed to speak with the agents.

26 Defendant denied knowledge of the marijuana found in his semi-
27 trailer. Defendant confirmed he owned the tractor trailer. He told
28 the agents that he worked for Juarez Brothers Trucking in Bakersfield,

1 California. He gave the name of David Hernandez as the dispatcher.
2 Defendant claimed that on January 8, 2008, the day before his arrest,
3 he delivered a load of carrots from Grimmway Farms in Bakersfield to
4 the El Centro Cold Storage warehouse in El Centro, California.

5 Defendant stated that his semi-trailer was unloaded at the
6 storage warehouse at approximately 11:45 p.m. Thereafter, a forklift
7 operator named "El Gordo" loaded his semi-trailer with empty plastic
8 bins. Defendant remained inside the tractor trailer during that time
9 and could not see "El Gordo" loading his trailer.

10 After leaving the storage warehouse, Defendant drove his tractor
11 trailer to Westmorland. Defendant claimed he intended to drive north
12 to Bakersfield in order to deliver the plastic bins to Grimmway Farms.
13 Defendant drove a distance, took a short nap, and then proceeded to
14 the Westmorland checkpoint.

15 **D. FOLLOW-UP INVESTIGATION**

16 Special Agent Slattery conducted follow-up investigation based
17 on Defendant's statements. He did the following:

18 1. Agent Slattery spoke with Richard Hiura, Director of
19 Processing and Packaging for River Ranch Fresh Foods in El
20 Centro, California. Mr. Hiura confirmed that River Ranch
21 received a shipment of carrots from Grimmway Farms but it
22 was on January 9, 2008, and the shipment arrived at
23 approximately 11:15 a.m. He stated shipments of carrots
24 only arrive in the morning hours and not in the evening.
25 Mr. Hiura also added no such person by the name of "El
26 Gordo" worked at their facility.

27 2. Agent Slattery obtained a bill of lading from River Ranch
28 Fresh Foods which stated that the January 9, 2008 shipment

of carrots was delivered by a driver named Gilbert Ramos and not Defendant.

3. Agent Slattery was informed by River Ranch representatives that they do not load bins into trailers as described by Defendant. Moreover, River Ranch uses its own semi-trailers to transport carrots, not the personal trailers of the drivers.

8 4. Agent Slattery spoke with David Hernandez, a dispatcher
9 employed by Juarez Brothers Trucking in Bakersfield,
10 California. Mr. Hernandez verified Defendant worked for
11 them but had not made any deliveries for them since
12 November 2007.

II.

POINTS AND AUTHORITIES

A. EXPERT TESTIMONY

16 If specialized knowledge will assist the trier-of-fact in
17 understanding the evidence or determining a fact in issue, a qualified
18 expert witness may provide opinion testimony on the issue in question.
19 Fed.R.Evid. 702. The trial court has broad discretion to admit expert
20 testimony. See, e.g., United States v. Alonso, 48 F.3d 1536, 1539
21 (9th Cir. 1995). An expert may base his/her opinion on hearsay or
22 facts not in evidence where the facts or data relied upon are of the
23 type reasonably relied upon by experts in the field. Fed.R.Evid. 703.
24 In addition, an expert may provide opinion testimony even if it
25 embraces an ultimate issue to be decided by the trier-of-fact.
26 Fed.R.Evid. 704.

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1 **1. Identity of Substance as Marijuana**

2 Unless the parties enter into a stipulation involving the
3 marijuana seized in this case, the Government intends on calling DEA
4 Senior Forensic Chemist, Terry V. Caldwell, to testify as to the
5 identity of the substance seized from the vehicle in this case. The
6 Government expects him to testify that laboratory examinations
7 confirmed that the contraband was marijuana, a Schedule I Controlled
8 Substance. This testimony bears directly on an element of the charged
9 offense: that marijuana is a prohibited drug.

10 This testimony is permitted under Rule 702 of the Federal Rules
11 of Evidence, which allows witnesses qualified as experts to testify
12 as to scientific or technical knowledge that "will assist the trier
13 of fact to understand the evidence." See United States v. Cruz, 127
14 F.3d 791, 801 (9th Cir. 1997) (DEA forensic chemist properly
15 established as expert to identify nature of controlled substance);
16 United States v. Burden, 497 F.2d 385, 387 (8th Cir. 1974) (forensic
17 DEA chemist, whose educational background and experience were
18 established, was properly allowed to testify as an expert on the
19 various tests performed on a substance to confirm that it was
20 marijuana).

21 **2. Value of the Drugs**

22 The Government intends to present expert testimony about the
23 quantity, wholesale value, and street value of the marijuana seized
24 in this case. The quantity and value of the marijuana
25 circumstantially demonstrate that the Defendant knew that the truck
26 he drove contained marijuana, and that the Defendant constructively
27 possessed the marijuana with the intent to distribute it. Knowledge
28 and intent are elements of the offense charged in this case.

1 The Ninth Circuit permits the use of such expert testimony. In
2 United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994), for
3 instance, the Defendant was charged with the importation of heroin
4 after he and others attempted to smuggle approximately 2.5 pounds of
5 heroin across the border. At trial, the Government introduced the
6 expert testimony of a DEA agent as to the street value of the heroin,
7 assuming it had been cut repeatedly and sold on the street. The Ninth
8 Circuit held that agents can testify to the street value of narcotics
9 and that counsel can argue reasonable inferences from such testimony.
10 See also United States v. Savinovich, 845 F.2d 834, 838 (9th Cir.
11 1988) (price, quantity, and quality of narcotics is relevant to
12 defendant's intent to distribute).

13 **3. Personal Use Versus Distributable Amount**

14 Finally, the Government intends to elicit expert testimony from
15 an Immigration and Customs Enforcement or D.E.A. Special Agent to
16 establish that the quantity of marijuana found in the vehicle driven
17 by Defendant is a distributable, rather than a personal use amount.
18 See United States v. Tavakkoly, 238 F.3d 1062, 1067 (9th Cir. 2001)
19 (undisputed expert testimony that 1.35 kg of opium was inconsistent
20 with possession for personal use was relevant to prove defendant's
21 intent to distribute); United States v. Alatorre, 222 F.3d 1098, 1104-
22 05 (9th Cir. 2000) (expert testimony properly admitted to establish
23 that quantity of marijuana was distributable amount, rather than just
24 personal use amount).

25 **B. Demeanor Evidence Should Be Admitted**

26 Evidence regarding a defendant's demeanor and physical appearance
27 is admissible as circumstantial evidence that is helpful to the jury's
28 determination as to whether a defendant knew drugs were concealed in

1 the vehicle. Fed.R.Evid. 701; United States v. Hursh, 217 F.3d 761
2 (9th Cir. 2000) (holding that a jury may consider a defendant's
3 nervousness during questioning at Calexico port of entry); United
4 States v. Fuentes-Cariaqa, 209 F.3d 1140, 1144 (9th Cir. 2000)
5 (holding that it is within the ordinary province of jurors to draw
6 inferences from an undisputed fact such as a defendant's nervousness
7 at Calexico port of entry); United States v. Barbosa, 906 F.2d 1366,
8 1368 (9th Cir. 1990) (holding that a jury could infer guilty knowledge
9 from a defendant's apparent nervousness and anxiety during airport
10 inspection); United States v. Lui, 941 F.2d 844, 848 n.2 (9th Cir.
11 1991) (holding that a jury could consider guilty knowledge from a
12 defendant's acting disinterested during airport inspection).

13 Here, witnesses for the United States may properly testify to
14 Defendant's demeanor and physical appearance, as they have personal
15 knowledge based upon their observations of Defendant.

16 **C. CHARACTER EVIDENCE**

17 The Government anticipates that the defense will call character
18 witnesses to testify on behalf of the Defendant. The Court should
19 limit any such evidence to opinion or reputation testimony about the
20 defendant's general character for lawfulness. See Fed.R.Evid.
21 404(a)(1), 405(a), and 803(21); United States v. Diaz, 961 F.2d 1417,
22 1419-20 (9th Cir. 1992) (district court properly excluded testimony
23 about defendant's "character trait for [not] being prone to large-
24 scale drug dealing").

25 In introducing positive character evidence, Defendant must
26 restrict himself to evidence regarding "law abidingness" and honesty.
27 Defendant may not introduce evidence concerning specific instances of
28 good conduct, lack of a prior record, or propensity to engage in

1 specific good acts. United States v. Hedgecorth, 873 F.2d 1307, 1313
2 (9th Cir. 1987) ("[W]hile a defendant may show a characteristic for
3 lawfulness through opinion or reputation testimony, evidence of
4 specific acts is generally inadmissible.") (citations omitted); United
5 States v. Barry, 814 F.2d 1400, 1403 (9th Cir. 1987); Gov't of Virgin
6 Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985) ("[T]estimony that
7 one has never been arrested is especially weak character evidence.").

P. UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

9 As of the date of the preparation of these motions, Defendant has
10 produced no reciprocal discovery. The United States requests that
11 Defendant comply with Rule 16(b) of the Federal Rules of Criminal
12 Procedure, as well as Rule 26.2 which requires the production of prior
13 statements of all witnesses, except for those of Defendant. Defendant
14 has not provided the United States with any documents or statements.
15 Accordingly, the United States will object at trial and ask this Court
16 to suppress any evidence at trial which has not been provided to the
17 United States.

III.

CONCLUSION

20 For the foregoing reasons, the Government respectfully
21 requests that the Court grant its motions in limine.

DATED: September 8, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Carlos Arguello

CARLOS ARGUELLO
Assistant U.S. Attorney
carlos.arquello2@usdoj.gov